In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-501

MICHAEL D. MICHAEL,

Petitioner,

— against —

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to The Appellate Division, Supreme Court of New York, Fourth Judicial Department and Brief in support thereof.

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PETITION.

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1979

No.

MICHAEL D. MICHAEL,
Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

1. Petition for Writ of Certiorari to the Appellate Division, Supreme Court of New York, Fourth Judicial Department.

TO the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

SUMMARY STATEMENT OF MATTER INVOLVED

Your petitioner entered a plea of guilty and was sentenced on the 8th day of September, 1978. On appeal to the Appellate Division, Supreme Court of New York, Fourth Judicial Department, the Judgment was affirmed. An application for leave to Appeal to the Court of Appeals was denied without opinion on the 26th day of June, 1979.

The Order of the Appellate Division, Supreme Court of New York, Fourth Judicial

Department recites that,

"It is hereby ordered, that the judgment so appealed from be, and the same hereby is unanimously affirmed.

Memorandum, which is hereby made a part hereof."

The Memorandum decision recites that:

"Appellant was stopped at 2:30 a.m. because the arresting officer observed his vehicle swerving from one side of the road to the other. The officer stated that he noted appellant's fumbling efforts to locate his license and registration, the very strong smell of alcohol on his breath and, upon exiting the vehicle, his unstable walk, based on these facts, appellant was arrested for Driving While Intoxicated. A subsequent breathalyzer test showed .21% blood alcohol.

Appellant argues that Section 501 (Subdivision 1, Paragraph C) of the Vehicle and Traffic Law which provides for a "detachable" "record of conviction stub" that "shall not be subject to inspection" by police, conferred upon him a constitutional right of privacy which was violated in that case. We assume, as did the Trial Court, that the arresting officer communicated on his radiotelephone at the scene and learned that ap-

pellant had a previous DWI conviction. This assumption is founded on the fact that the appearance ticket issued in this case alleged a violation of Section 1192, Subdivision 3 of the Vehicle and Traffic Law as a "felony." We do not find that the section was violated under the circumstances of this case. Here appellant was not required to and did not in fact exhibit his record of conviction stub to the arresting officer. Inasmuch as the provisions of this section of the Vehicle and Traffic Law "are restricted to those matters specifically mentioned therein" (PEOPLE VS. DAWLEY, 19NY2d 663, 664), the conviction is affirmed."

DETAILS OF THE CRIME

On the 3rd day of November, 1977 at approximately 2:25 in the forenoon of said day, Officer Shue of the police department of the Village of North Syracuse, New York, who was then and there driving northerly along Rt. 11, observed the defendant driving southerly along Rt. 11 in the area in front of the Main Street Elementary School. Thereafter, Officer Shue turned the vehicle he was operating around and followed the defendant for a short distance after which he signaled for the defendant to stop, which the defendant did forthwith.

Thereafter, Officer Shue demanded the defendant's operators license and registration which were given to the officer. The defendant did not give the officer that portion of his operators license that contained his record of convictions. Officer Shue returned to his patrol vehicle he was operating and was observed by the defendant to be in radio communication with a party unknown to the defendant. After such communication, Officer Shue returned to the defendant's vehicle and informed the defendant that he, the defendant, had a previous arrest for Driving While Intoxicated and issued to the defendant a Uniform Traffic Ticket which accused the defendant of Driving While Intoxicated, in violation of Section 1192, Subdivision 3, of the Vehicle and Traffic Law. The traffic ticket contained the notation (felony). The defendant was also issued a Uniform Traffic Ticket for failing to keep right, in violation of Section 1120-A of the Vehicle and Traffic Law.

The defendant moved to suppress all evidence obtained by Officer Shue subsequent to the time that he, Officer Shue, apparently obtained defendant's record of conviction by means of radio communication which motion was denied.

The case regularly came on for trial that resulted in a hung jury. Thereafter, de-

fendant entered a plea of guilty to a reduced charge of Driving While Intoxicated as a misdemeanor in violation of Section 1192, Paragraph 3, of the Vehicle and Traffic Law and appealed from the judgment entered upon the plea of guilty and from the order denying his motion for suppression.

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

It is respectfully submitted that this court has jurisdiction of this petition for Certiorari under Section 207 (B) of the Judicial Code as amended by the act of February 12, 1925, Section 1, 28 U.S.C., being one to review the final judgment of the Appellate Division, Supreme Court of the State of New York, Fourth Judicial Department, the highest Court of Appeals of the State of New York in which a decision could be had, rendered June 1, 1979.

The judgment affirmed a judgment of conviction and as certified the constitutional questions were considered and necessarily decided.

QUESTIONS PRESENTED

1. Do the individual rights protected by the 4th Amendment include control by the

individual of release of an individuals governmentally maintained driving record?

2. Does the due process clause of the 14th Amendment prohibit the use of one's driving record as a basis for an arrest for violation of Section 1192, Subdivision 2 and 3 of the Vehicle and Traffic Law of the State of New York?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The Appellate Division, Supreme Court of the State of New York, Fourth Judicial Department, has decided a federal question of substance in a way not in accord with the applicable decisions of this court in that the Appellate Division, Supreme Court of the State of New York, Fourth Judicial Department, has affirmed a ruling by the trial court that a search by means of radio of the defendant's driving record between the time of initial detention and formal arrest did not constitute an unlawful search and seizure contrary to the prohibition of the 4th Amendment to the Constitution of the United States of America and that, although the defendant was unable to cross examine the arresting officer with respect to the reliance the officer placed upon the defendant's previous driving

record in determining whether or not to make the arrest without putting such driving record before the jury for consideration with respect to the issue of guilt or innocense of the crime charged, the defendant was not deprived of his rights without due process of the law.

The position of the petitioner is that it is unreasonable to allow radio-computer search and seizure of one's driving record simultaneously with detention of the individual and to predicate to any extent the arrest of the individual upon the results of such contemporaneous search and seizure. Further, the defendant contends that because of the procedure utilized he was prevented from fully testing the credibility of the arresting officer before the jury at the time of trial. In sum, the defendant was denied the basic right of freedom from unreasonable search and seizure and denied the basic right to cross examine his adversary.

To support his position, the defendant releis upon the following cases:

KATZ V. UNITED STATES, 389 U.S. 347
JOHNSON V. UNITED STATES,1948, 333 US. 10
BARBER V. PAGE, 390 U.S. 719
BROWN V. MISSISSIPPI, 297 U.S. 278, 286

CHAMBERS V. MISSISSIPPI, 410 U.S. 284

HOFFA V. UNITED STATES, 1966, 293 U.S. 293

DAVIS V. MISSISSIPPI, 1969, 394 U.S. 721

WHEREFORE, your petitioner MICHAEL D. MICHAEL, prays that a Writ of Certiorari may issue out of and under the seal of this court, directed to the Appellate Division, Supreme Court of New York, Fourth Judicial Department, commanding the said court to certify and serve on this court for review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein, and that the order of the Appellate Division, Supreme Court of New York, Fourth Judicial Department, affirming the judgment in this cause may be reversed and that the petitioner MICHAEL D. MICHAEL may have such other and further relief in the premises as this court may deem proper.

Dated:

_____Petitioner

_____Counsel For
Petitioner

CERTIFICATE OF COUNSEL.

STATE OF NEW YORK)
)ss.:
COUNTY OF ONONDAGA)

I hereby certify that I have examined the foregoing petition for a Writ of Certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

_____Counsel for
Petitioner

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM 1979

No.

MICHAEL D. MICHAEL,
Petitioner,

-against-

THE STATE OF NEW YORK,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The opinion of the Appellate Division, Fourth Judicial Department of the Supreme Court of the State of New York, not yet reported, appears in the appendix hereto. No opinion was handed down by the Court of Appeals of the State of New York on the denial of motion for a certificate of Leave to Appeal to the Court of Appeals. The certificate denying leave to appeal to the Court of Appeals appears in the appendix hereto.

STATEMENT OF JURISDICTION AND QUESTIONS PRESENTED AND THE FACTS

The statement under which the Jurisdiction of this Court is involved, of the questions presented, and the factual matter relative to this application appear in the petition to which this brief is annexed.

ARGUMENT

The petitioner urges that he has been convicted of the crime of operating a motor vehicle while intoxicated in violation of Section 1192, Subdivision 3, of the Vehicle and Traffic Law of the State of New York and sentenced as a result of an arrest, a search and seizure and a procedure so violative of the protection of his constitutional rights as to be a denial to him of the protection of the 4th and 14th Amendments to the Constitution of the United States.

POINT I

THE QUESTION INVOLVED HERE IS WHETHER OR NOT INDIVIDUAL RIGHTS PROTECTED BY THE 4th AMENDMENT INCLUDE CONTROL OF RELEASE OF THE INDIVIDUAL'S GOVERNMENTALLY MAINTAINED DRIVING RECORD.

Certain it is that one does not lose all reasonable expection of privacy because automobile use is subject to governmental regulation. DELAWARE V. PROUSE, 99 S. Ct. 1391. KATZ V. UNITED STATES, 389 U.S. 347, holds that the breadth of the protection of the 4th Amendment is determined by examination of the thing claimed to be protected and not by the place where the thing is located. Therefore, the fact that the individual's driving record is housed in a governmental

office or computer bank is not determinative of the question of whether or not release of one's driving record falls within the protection of the 4th Amendment. According to the KATZ case, Supra, the question of whether or not the thing in question is covered by the 4th Amendment is by determination of whether or not the individual could reasonable assume that it would be protected. The KATZ case, supra, mandates close examination ofthe thing.

Examination of one's driving record, reveals, without question, that it is a part of the individual. Without a being having been, an individual record does not exist. Since the 4th Amendment "protects people," KATZ case, supra, the question is, is this a part of the person that is protected and the fact that gaining access to the defendant's record was done electronically "can have no constitutional significance?" KATZ case, supra, P. 353.

Could the defendant reasonably assume that his driving record would be protected from electronic seizure by the arresting officer? It would seem that, in spite of the Court of Appeals strict construction of Section 504, Paragraph 1, of the VEHICLE AND TRAFFIC LAW of the State of New York, PEOPLE V. DAWLEY, 19NY2d 663,664, the mandatory prohibitive language of the statute dictates an affirmative answer.

Especially is this true considering the fact that the defendant's record of conviction stub which he did not give to the arresting officer at the time of his apprehension was issued by the state with the provision that it did not have to be presented to a police officer. Appendix C. The state put in the pocket of the defendant the ground for reasonably believing that the police did not have access to his driving record at the time of his apprehension. HOFFA V. UNITED STATES, 385 U.S. 293, 381, 383. The question remains, was the search and seizure incident to a lawful arrest? This case presents electronic surveillance contemporaneous with the individual's arrest. It can "hardly be deemed an 'incident' of that arrest." KATZ case, Supra, P. 357. The surveillance wasn't even in the area of the defendant. DAVIS V. MISSISSIPPI, 394 U.S. 721, prohibits searches and seizures during "investigatory detentions." The officer searched during detention. In order to have probable cause for the arrest as a felony, the officer would have to have had knowledge of the defendant's previous conviction of Driving While Intoxicated prior to the detention. See Section 1192, Subdivision 5, of the VEHICLE and TRAFFIC LAW of the State of New York. Appendix D. However, to detain for the purpose of determining

Whether the commission of a lesser crime was being committed, all that the officer needed to possess was an articulable reason to believe that a crime was being committed. PEOPLE V. DE BOUR, 40 NY2d, 210; CRIMINAL PROCEDURE LAW of the State of New York, Section 140.10. Appendix E. DELAWARE V. PROUSE, 99 S. Ct. 1391. This, without the defendant's driving record, the officer apparently had, although some of the jurors at the time of trial, even absent cross examination with respect to reliance of the officer on the defendant's record for purpose of arrest, apparently did not believe the officer. Assuming that the officer did make a lawful detention of the defendant, the question is, should he be allowed to make an electronic survey of the detained person's record during detention? The answer would seem to be no. The probability is too great that arrest will be predicated on record and not on what the officer observes. An arrest for a moving violation or crime should be based only upon then observation unblurred by contemporaneously or after acquired knowledge of the operators past record.

POINT II

DUE PROCESS OF LAW MANDATES THAT ONE'S DRIVING RECORD NOT BE USED AS A BASIS FOR HIS ARREST FOR VIOLATION OF SECTION 1192, SUBDIVISION 2 and 3 OF THE VEHICLE AND TRAFFIC LAW OF THE STATE OF NEW YORK.

Secreted in the trial procedure of one accused of operating an automobile while intoxicated as a felony in violation of Section 1192, Subdivision 2 and 3 of the Vehicle and Traffic Law of the State of New York when one's record is used as a part of the basis for the arrest is an obstacle to the constitutional right of cross-examination. The procedure followed in the State of New York is to try the issue of operating while intoxicated with respect to the current accusation and, if the defendant is found guilty, to then give the defendant the opportunity to admit or deny the previous conviction claimed, and if it is denied, to try the issue of whether or not the defendant was previously convicted of operating while intoxicated. Although, the initial issue is denominated as a felony, evidence of the previous conviction is not put before the jury so as not to prejudice the defendant with respect to the present accusation. Thus, without prejudicing the defendant, it is impossible to cross examine the arresting officer with respect to

the degree the defendant's record was utilized by the officer in determining whether or not to arrest. The officer's credibility with respect to observations at the time of arrest cannot be fully explored.

At the time of oral argument in the Appellate Division and on oral argument before associate Justice Jones for permission to appeal to the Court of Appeals, the suggestion was made that such exploration could be made absent the jury and defendant's rights reserved. The problem with the suggested procedure is that the main function of the Jury, determination of credibility of the witness, is removed from the jury. It is Legion, that it is the constitutional right of the defendant to have the opportunity to cross examine the witnesses against him. See BARBER V. PAGE, 390 U.S. 719; CHAMBERS V. MISSISSIPPI, 410 U.S. 284.

CONCLUSION

Calm review of this case reveals that basic rights of the defendant were denied and a Writ of Certiorari should be issued to review the judgment of the Appellate Division, Supreme Court of New York, Fourth Judicial Department.

Respectfully submitted,

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APPENDIX

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT ORDER.

379

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PRESENT: DILLON, P.J., CARDAMONE, SCHNEPP, DOERR, MOULE, JJ.

People of the State of New York, Respondent,

vs.

Michael D. Michael, Appellant.

The above named Michael D. Michael, defendant

having appealed to this Court from a judgment of the Onondaga County Court, entered in the Onondaga County Clerk's office on September 8, 1978 and said appeal having been argued by, John Henry of counsel for appellant, Gail Uebelhoer of counsel for respondent,

and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be, and the same hereby is unanimously affirmed.

Memorandum, which is hereby made a part hereof.

Entered: June 1, 1979

MARY F. ZOLLER, Clerk

MEMORANDUM

379. (Onondaga Co.) - People of the State of New York, Respondent, v. Michael D. Michael, Appellant. - Judgment unanimously affirmed. Memorandum: Appellant was stopped at 2:30 a.m. because the arresting officer observed his vehicle swerving from one side of the road to the other. The officer stated that he noted appellant's fumbling efforts to locate his license and registration, the very strong smell of alcohol on his breath and, upon exiting the vehicle, his unstable walk. Based on these facts appellant was arrested for driving while intoxicated. A subsequent breathalyzer test showed .21% blood alcohol.

Appellant argues that section 501 (subd 1, par c) of the Vehicle and Traffic Law which provides for a "detachable" "record of conviction stub" that "shall not be subject to inspection" by police, conferred upon him a constitutional right of privacy which was violated in this case. We assume, as did the trial court, that the arresting officer communicated on his radio-telephone at the scene and learned that appellant had a previous DWI conviction. This assumption is founded on the fact that the appearance ticket issued in this case alleged a violation of section 1192, subdivision 3 of the Vehicle and Traffic Law as a "felony". We do not find

that the section was violated under the circumstances of this case. Here appellant was not required to and did not in fact exhibit his record of conviction stub to the arresting officer. Inasmuch as the provisions of this section of the Vehicle and Traffic Law "are restricted to those matters specifically mentioned therein" (People v. Dawley, 19 NY2d 663, 664), the conviction is affirmed.

(Appeal from Judgment of Onondaga County Court, Sullivan, J. - Driving While Intoxicated.) Present: Dillon, P.J., Cardamone, Schnepp, Doerr, Moule, JJ.

COURT OF APPEALS CERTIFICATE DENYING LEAVE TO APPEAL.

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. HUGH R. JONES, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

Michael D. Michael,
Appellant.

CERTIFICATE DENYING LEAVE

I, HUGH R. JONES, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Utica, New York
June 26, 1979

S/ HUGH R. JONES
Associate Judge

*Description of order: Order of Appellate Division, Fourth Department, dated 6/1/79, affirming judgment of County Court, Onondaga

County, rendered 9/8/78 (Conviction of violation of ¶ 1192 (3) of Vehicle & Traffic Law as a misdemeanor).

NEW YORK STATE VEHICLE AND TRAFFIC LAW SECTION 504, PARAGRAPH 1.

NEW YORK STATE

VEHICLE AND TRAFFIC LAW

¶ 504 Form of license

1. Every license or renewal thereof issued on or after September first, nineteen hundred seventy-six shall contain a distinguishing number or mark and adequate space upon which an anatomical gift, pursuant to article forty-three of the public health law, by the licensee shall be recorded and shall contain such other information and shall be issued in such form as the commissioner shall determine. The commissioner may provide adequate space on a detachable or separate part of such license, to be known as the "record of convictions stub," for the recording thereon of convictions as provided in section five hundred fourteen of this chapter and such record of convictions stub shall be detachable by the licensee and shall not be subject to inspection by any motor vehicle inspector, peace officer, state policeman or any other person, but shall be exhibited on demand only to a magistrate after conviction of the licensee or, at a hearing, to any person designated by the commissioner to conduct such a hearing. The license may also contain the photograph of the licensee, if required by the commissioner.

VEHICLE AND TRAFFIC LAW 1192.

VEHICLE AND TRAFFIC

¶ 1192. Operating a motor vehicle while under the influence of alcohol or drugs

1. No person shall operate a motor vheicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol.

2. No person shall operate a motor vehicle while he has .10 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.

3. No person shall operate a motor vheicle while he is in an intoxicated condition.

4. No person shall operate a motor vehicle while his ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.

5. A violation of subdivisions[1] two, three or four of this section shall be a misdemeanor and shall be punishable by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment.

¶ 1192

Note 1/2

A person who operates a vehicle in violation of subdivisions two or three of this section after having been convicted of a violation of subdivisions two or three of this section, or of driving while intoxicated, within the preceding ten years, shall be guilty of a felony. A person who operates a vehicle in violation of subdivision four of this section, after having been convicted of a violation of subdivision four of this section, or of driving while his ability is impaired by the use of drugs within the preceding ten years, shall be guilty of a felony.

Added L. 1970, c. 275, ¶3; amended L.1971, c. 495, ¶1; L.1972, c. 450, ¶ 1; L.1975, c. 154, ¶ 12.

[1]So in original.

NEW YORK STATE

CRIMINAL PROCEDURE LAW

¶ 140.10 Arrest without a warrant; by police officer; when and where authorized

1. Subject to the provisions of subdivision two, a police officer may arrest a person for:

(a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and

(b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

AMENDMENTS 4 AND 14 OF THE CONSTITUTION OF THE UNITED STATES.

THE CONSTITUTION OF THE UNITED STATES

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-501

MICHAEL D. MICHAEL,

Petitioner,

— *v.* —

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT

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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-501

MICHAEL D. MICHAEL,

Petitioner,

— *v.* —

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT

OPINIONS BELOW

The Onondaga County Court's Memorandum/Order dated May 9, 1978, denying petitioner's motion to suppress, is not published. The Memorandum filed by the New York State Supreme Court, Appellate Division, Fourth Department, affirming petitioner's conviction on June 1, 1979, has not yet been reported and appears in Petitioner's Appendix at pp. A-A-2. Petitioner's application for permission to appeal to the New York Court of Appeals was denied on June 26, 1979, and appears in Petitioner's Appendix at pp. B-B-1.

JURISDICTION

Petitioner is seeking a writ of certiorari to the New York Supreme Court, Appellate Division, Fourth Department, pursuant to Title 28 USC §1257 (3).

QUESTION PRESENTED

1. Do Petitioner's claims constitute "special and important reasons" warranting this Court's review on a writ of certiorari?

STATEMENT OF THE CASE

Petitioner was indicted for OPERATING A MOTOR VEHICLE WHILE IN AN INTOXICATED CONDITION (as a Felony), OPERATING A MOTOR VEHICLE WHILE HAVING .10 OR MORE OF ONE PERCENTUM BY WEIGHT OF ALCOHOL IN HIS BLOOD (as a Felony), and FAILING TO KEEP RIGHT in violation of the New York Vehicle and Traffic Law §§1192(3), 1192(2), and 1120(a), respectively (9). On July 5, 1978, petitioner pled guilty to the crime of OPERATING A MOTOR VEHICLE WHILE IN AN INTOXICATED CONDITION (as a Misdemeanor). He was sentenced on September 8, 1979 to serve an intermittent 20-day weekend term of imprisonment and probation for a period of two years, eleven months and ten days (3).

On October 10, 1978 petitioner filed a notice of appeal (2), and on his direct appeal challenged his conviction on the ground that since the arresting officer learned over the police radio of his prior Driving While Intoxicated conviction, his arrest was in violation of Vehicle and Traffic Law §504(1) which provides that a licensee's detachable conviction stub shall not be subject to inspection by a policeman. The Supreme Court of New York, Appellate Division, affirmed his conviction, holding that petitioner's stop and arrest were proper and that since he was not required to and did not show the arresting officer his detachable conviction stub, Vehicle and Traffic Law §504(1) was not violated (___ A.D.2d ___, 6/1/79, 4th Dept.). Leave to appeal this decision was denied by Associate Judge Hugh R. Jones of the New York Court of Appeals on June 26, 1979, there being "no question of law presented which ought to be reviewed by the Court of Appeals . . . ." (___ N.Y.2d ____, 6/26/79).

Petitioner now challenges the aforementioned decision of the New York Supreme Court, Appellate Division, Fourth Department.

FACTS

At approximately 2:15 a.m. on November 3, 1977, while on routine patrol, Officer Shue of the North Syracuse Police Department observed petitioner driving at a very slow rate of speed and swerving from one side of the road to the other (Appendix A). When he subsequently stopped petitioner and requested to see his license, petitioner had a great deal of trouble finding it, and smelled of alcohol (Appendix A). Furthermore, when asked to get out of the car, petitioner was unable to walk steadily (Appendix A). These facts and others led Officer Shue to believe that petitioner was intoxicated, and he accordingly placed petitioner under arrest, at some point learning that petitioner had previously been convicted of Driving While Intoxicated in 1972 (Appendix A; 18). However, Officer Shue never saw petitioner's detachable conviction stub, learning of his prior conviction only be means of a police radio communication (4-5; 15-16). Petitioner's motion to suppress any evidence obtained subsequent to his arrest was denied by the Onondaga County Court (Gale, J.) (4-7).

Petitioner's jury trial commenced on June 13, 1978, but on June 16, 1978 the jury was discharged since it was unable to agree on a verdict (8). Thereafter, on July 5, 1978, petitioner entered a plea of guilty to OPERATING A MOTOR VEHICLE WHILE IN AN INTOXICATED CONDITION (as a Misdemeanor) in full satisfaction of the indictment (3).

ARGUMENT

POINT I

PETITIONER PRESENTS NO "SPECIAL AND IMPORTANT REASONS" TO WARRANT THIS COURT'S EXAMINATION OF THE DECISIONS BELOW.

Rule 19 of the Rules of the Supreme Court states in part that "(a) review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Mr. Chief Justice Taft, speaking for a unanimous court, noted in reference to the writ:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . . *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Clearly, the issue presented by petitioner in the case at bar meets none of these criteria and instead relates to matters of importance to petitioner alone rather than to the public in general. Moreover, while petitioner seeks to characterize the issue in this case as a constitutional one so as to justify review by this Court on certiorari, it is only too obvious that the only issue at bar is the interpretation of New York Vehicle and Traffic Law §504(1), providing that a licensee's detachable conviction stub shall not be subject to inspection by a policeman, but shall be shown on demand only to a judge or hearing officer after conviction, a matter long since decided by the appellate courts in the State of New York. Thus, there are no important questions of federal law that would require this Court's examination of this case.

. . . as to the claim that the officer's independent knowledge of the prior conviction violates his right to be free from unreasonable searches and seizures

In an attempt to couch his claim in constitutional terms so as to justify this Court's review, petitioner first claims that the call

over the police radio concerning his prior conviction somehow violated his Fourth Amendment rights to be free from unreasonable searches and seizures, in that Vehicle and Traffic Law §504(1) gave him an expectation of privacy in his prior record (Petitoner's Petition and Brief, pp.11-14). Despite these manipulations otherwise, it is clear that the only issue in this case was whether New York Vehicle and Traffic Law §504(1) was violated, which it wasn't.

It must initially be noted that even if one could consider the officer's call over the police radio to be in violation of Vehicle and Traffic Law §504(1), that call *in no way* contributed to petitioner's stop or arrest. The record reveals and the Appellate Division properly found that petitioner's arrest was predicated only upon the officer's initial observation of his car swerving from one side of the road to another, his subsequent fumbling, his difficulty in walking, and the strong odor of alcohol on his breath. Appendix A; *cf. Delaware* v. *Prouse*, 440 U.S. _____, 99, S.Ct. 1391,1400 (1979). Thus, the radio call to ascertain if petitioner had any prior Driving While Intoxicated convictions, even if "illegal", was entirely irrelevant; it is only evidence which is a *product* of illegal police activity which is subject to the exclusionary rule. *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961).

Moreover, it is obvious that the *only* reason the officer obtained the information concerning petitioner's prior conviction in the first place was to ascertain whether the charge against him was a felony or a misdemeanor. Under the provisions of New York Vehicle and Traffic Law §1192(5), a Driving While Intoxicated *misdemeanor* offense is elevated to a *felony* only by reason of a prior §1192(2) or (3) conviction in the preceding ten years. Accordingly, there was absolutely no way for the officer, or anyone else for that matter, to know whether to charge appellant with a felony or misdemeanor *without* inquiring into any past convictions, as was properly done in this case. As such, petitioner's assertion that Vehicle and Traffic Law §504(1) mandates complete ignorance of a defendant's

prior traffic convictions is absurd. As the trial court properly recognized, certainly such a result was not intended by the New York Legislature in enacting this statute (6-7).

Indeed, a reading of the reasons behind the enactment of Vehicle and Traffic Law §504(1) shows the legislature's concern was not over the police's knowledge of a defendant's past convictions, but over the defendant's right to be convicted or acquitted solely on the facts of the particular case. As Governor Rockefeller, on approving the statutory provision for a detachable conviction stub, stated:

> It is appropriate and consistent with our concepts of a fair hearing that one charged with an offense be convicted or acquitted of such offense on the basis of the particular facts of that occasion. Prior to conviction an individual's past record has no relevance to the determination of whether a new offense was actually committed. Message of the Governor, 1961 McKinney's Session Laws, p. 2132.

Thus, a furtherance of the legislative reasons for enacting Vehicle and Traffic Law §504(1) would require only that all knowledge of a defendant's prior record be kept from the trier of facts. This principle was explicitly recognized in *Matter of DeVito*, 77 Misc.2d 524,527, Jeff.Co.Sup.Ct. (1974), where it was held that even though the trial judge improperly knew about appellant's prior convictions as recorded by the New York State Department of Motor Vehicles, there was no resulting prejudice to that defendant since the judge was not the trier of facts.

The only right to privacy petitioner could reasonably expect by operation of Vehicle and Traffic Law §504(1) was the right to withhold his *conviction stub* from the authorities prior to his conviction. This right was fully exercised here. Moreover, it is well settled under New York Law that the provisions of the instant section are restricted to those matters specifically mentioned therein. *People* v. *Dawley*, 19 N.Y.2d 663,664 (1967). Since the arresting officer herein did not at any point in this case see or ask to see petitioner's conviction stub, there

was simply no violation of the provisions of Vehicle and Traffic Law §504(1). In addition, on the facts of this case, where the only reasons for acquiring this knowledge was to determine whether petitioner was to be charged with a felony or a misdemeanor, the reasons behind the enactment of §504(1) were not violated either. Accordingly, petitioner's contentions are completely without merit.

. . . as to petitioner's claim that he was precluded from cross-examining the officer regarding his consideration of the prior conviction

Petitioner *for the first time* in this Court makes the claim that he was somehow denied his constitutional right to cross-examine the arresting officer regarding his consideration of petitioner's prior conviction when making this arrest. It is well settled that this Court will not consider matters not raised before the courts below even when the alleged constitutional errors involve a claimed violation of due process at a criminal trial. *Tacon* v. *Arizona*, 410 U.S. 351,353 (1973); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969). Petitioner has nowhere below either raised this issue or asserted any prejudicial effect due to this matter, and it is respectfully submitted that he should now be so precluded.

In any event, petitioner's complaint that he was somehow denied his right to cross-examine the arresting officer concerning his decision to arrest him is completely ludicrous. In the first place, it is uncontroverted that petitioner chose to plead guilty rather than to proceed to trial. As such, it is extremely difficult to *seriously* entertain his claim of a denial of cross-examination at this time.

In the second place, had petitioner in fact chosen to proceed to trial, respondent knows of no rule which would have forbidden him from cross-examining the officer regarding probable cause for petitioner's arrest, including any consideration by the officer of petitioner's prior conviction. The New York rule of

law designed to preclude admission of a defendant's prior convictions at trial as enunciated in *People* v. *Sandoval*, 34 N.Y.2d 371 (1974), was promulgated *solely* for the benefit of the defendant. See *People* v. *Mayrant*, 43 N.Y.2d 236,239 (1977); *People* v. *Dickman*, 42 N.Y.2d 294, 297-298 (1977); *People* v. *Wright*, 41 N.Y.2d 172,175 (1972). Obviously then, if the defendant himself elicits evidence of his prior convictions, such evidence is entirely proper.

More importantly, however, while a "criminal record" in itself is insufficient to justify a stop and arrest and therefore is violative of the Fourth Amendment. See *Delaware* v. *Prouse*, *supra* at _____, 99 S.Ct. at 1400; *Spinelli* v. *United States*, 393 U.S. 410,418-419 (1969). Such was not the case in the instant petition. Accordingly, petitioner's right to cross-examination was neither abridged *hypothetically* or in reality.

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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Onondaga County Civic Center
Syracuse, New York 13202

JOHN A. CIRANDO, ESQ.
Assistant District Attorney
Of Counsel.

Dated: October 22, 1979.

APPENDIX

APPENDIX A – Deposition of Joseph A. Shue, the Complainant, a Police Officer.

DEPOSITION

ONONDAGA COUNTY SHERIFF'S DEPARTMENT

State of New York
County of Onondaga } SS.:
Town of North Syracuse
Village

Case Complaint No. A77-24

People of the State of New York
vs.
Michael D. Michael
Defendant

I, Joseph A. Shue, the complainant, a police officer residing at Village of North Syracuse, New York

By this supporting deposition, make the following allegations of fact in connection with an accusatory instrument filed, or to be filed, with this court against the above named defendant :

At about 2:15 AM on the 3rd day of November, 1977 as I was on routine patrol in the Village of North Syracuse, I did observe a 1967 Dodge, bearing NY Reg 918 RXM traveling south on Rt 11, this vehicle was traveling at a very slow rate of speed and swerving from oneside of the road to the other. I stopped the vehicle and requested of the driver to see his license and registration, the driver of the vehicle is the defendant in this case, Michael D. Michael. The defendant had a great amount of trouble finding the items I requested. I also observed at this time that there was a very strong smell of some type of alcoholic beverage coming from his mouth. I had the defendant get out of his car and noticed that his walk was unstable. These and other actions lead me to believe that the defendant was intoxicated at this time and place. Defendant was placed under arrest given the warning concerning refusal to submit to chemical test and he stated that he would take the breath test. Subject was also given his rights under miranda. Defendant transported to the North Syracuse Police Dept where a breath-

APPENDIX A — Deposition of Joseph A. Shue, the Complainant, a Police Officer.

alyzer test was given by Sgt. C. Vinch with a result of .21% blood alcohol. It was also determined that the defendant had received a prior conviction for section 1192.3 of the N,Y,S, V & T Law on the 16th of June 1972. Defendant was arraigned, to reappear on the 7th day of November.

NOTE: False statements made herein are punishable as a Class A Misdemeanor pursuant to Section 210.45 of the Penal Law of the State of New York.

Sworn to before me this
___ day of _____ 19___

_____

_____

AFFIRMED UNDER PENALTY OF PERJURY this
4th day of November 1977

Joseph A Shue
COMPLAINANT